



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2017-0502; FRL-9980-32-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Permits for Construction and Major Modification of Major Stationary Sources for the Prevention of Significant Deterioration of Air Quality

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the State of West Virginia. This revision pertains to West Virginia's Prevention of Significant Deterioration (PSD) program. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2017-0502 at <http://www.regulations.gov>, or via email to duke.gerallyn@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio,

video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION: On June 6, 2017, the West Virginia Department of Environmental Protection (WVDEP), on behalf of the State of West Virginia, submitted a revision to its PSD regulations found at title 45, chapter 14 of the Code of State Rules (CSR) as a revision to the West Virginia SIP.

I. Background

WVDEP’s June 6, 2017 SIP submittal included a number of revisions to West Virginia’s PSD regulations under 45CSR14. The revisions were largely non-substantive and administrative in nature. However, as discussed in subsequent sections of this notice, WVDEP’s SIP submittal also contained revisions to PSD provisions relating to the regulation of greenhouse gases (GHGs). Additionally, WVDEP’s June 6, 2017 submittal letter references EPA’s conditional

approval¹ of two SIP submittals (June 6, 2012 and July 1, 2014), related to the regulation of fine particulate matter (PM_{2.5}). Specifically, the letter states, “...EPA may subsequently issue a final rule in which West Virginia’s conditional approval of the 2012 and 2014 SIP revisions of 45CSR14 will become final approvals.”² EPA notes that full and final approval has already been granted to West Virginia’s 2012 and 2014 submittals, and that there are no outstanding issues related to WVDEP’s regulation of fine particulate matter (PM_{2.5}). *See* 81 FR 53008 (August 11, 2016).

In a June 3, 2010 final rulemaking action, EPA promulgated regulations known as “the Tailoring Rule,” which phased in permitting requirements for GHG emissions from stationary sources under the CAA PSD and title V permitting programs. *See* 75 FR 31514. For Step 1 of the Tailoring Rule, which began on January 2, 2011, PSD or title V requirements applied to sources of GHG emissions only if the sources were subject to PSD or title V “anyway” due to their emissions of non-GHG pollutants. These sources are referred to as “anyway sources.” Step 2 of the Tailoring Rule, which began on July 1, 2011, applied the PSD and title V permitting requirements under the CAA to sources that were classified as major, and, thus, required to obtain a permit, based solely on their potential GHG emissions. Step 2 also applied to modifications of otherwise major sources that required a PSD permit because they increased only GHGs above applicable levels in the EPA regulations.

On June 23, 2014, the United States Supreme Court, in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency*,³ issued a decision addressing the Tailoring Rule and the

¹ *See* 80 FR 36483 (June 25, 2015).

² *See* WVDEP’s June 6, 2017 submittal letter, included in the docket for this action.

³ *See* 134 S.Ct. 2427.

application of PSD permitting requirements to GHG emissions. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The Supreme Court decision effectively upheld PSD permitting requirements for GHG emissions under Step 1 of the Tailoring Rule for “anyway sources” and invalidated PSD permitting requirements for Step 2 sources.

In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an amended judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule.⁴ The amended judgment preserves, without the need for additional rulemaking by the EPA, the application of the BACT requirement to GHG emissions from sources that are required to obtain a PSD permit based on emissions of pollutants other than GHGs (i.e., the “anyway” sources). The D.C. Circuit’s judgment vacated the regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v), “to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.”⁵

In response to these court decisions, EPA took final action on August 19, 2015 to remove the

⁴ *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 06/26/20, judgment entered for No. 09-1322 on 04/10/2015.

⁵ *Id.*

vacated elements from the federal PSD program. *See* 80 FR 50199. As discussed further in Section II of this notice, WVDEP's June 6, 2017 submittal included revisions enacted in order to make WVDEP's PSD program consistent with the federal program.

II. Summary of SIP Revision and EPA Analysis

WVDEP's June 6, 2017 submittal included revisions to the definition of "subject to regulation" at subdivision 2.80 of 45-14-2. Specifically, subdivisions 2.80.e, 2.80.f, and 2.80.g were deleted in their entirety. These subdivisions were the mechanism through which WVDEP implemented the Tailoring Rule Step 2 provisions which were vacated and revised by EPA as a result of the *UARG v. EPA* decision discussed in Section I of this notice. WVDEP's revised definition of "subject to regulation" is consistent with the federal definition at 40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v), and ensures that the preconstruction permitting requirements of WVDEP's PSD program will be applied to GHG sources in a manner consistent with the Supreme Court decision in *UARG v. EPA*. Further, EPA finds that these deletions are in accordance with section 110(l) of the CAA because they will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement.

In addition to the previously discussed revisions, WVDEP's June 6, 2017 submittal included a number of non-substantive, clarifying or administrative revisions. These include the filing date and effective date at subdivisions 45-14-1.3 and 45-14-1.4, and the removal of references to the deleted subdivisions discussed in Section II.A of this notice. WVDEP provided an underline/strikeout version of 45CSR14 so that all of the revisions can be tracked. A copy of this is included in the docket for today's action.

III. Proposed Action

EPA is proposing to approve West Virginia's June 6, 2017 SIP revision to its PSD regulations under 45CSR14. West Virginia's June 6, 2017 SIP revision is consistent with 40 CFR 51.166, CAA section 110(a)(2), and is in accordance with section 110(l) of the CAA because it will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement. EPA is soliciting public comments on the issues discussed in this rulemaking notice. These comments will be considered before taking final action.

IV. Incorporation by Reference

In this proposed rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the West Virginia rules regarding definitions and permitting requirements discussed in Section II of this preamble. EPA has made, and will continue to make, these materials generally available through <http://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those

imposed by state law. For that reason, this proposed action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, relating to the preconstruction requirements of West Virginia's PSD program, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: June 21, 2018.

Cosmo Servidio,
Regional Administrator,
Region III.

[FR Doc. 2018-14333 Filed: 7/3/2018 8:45 am; Publication Date: 7/5/2018]